77-444
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC., *Appellants,*

v.

THE CITY OF NEW YORK, *et al.*, *Appellees.*

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

DANIEL M. GRIBBON
JOHN R. BOLTON

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6118

CARL HELMETAG, JR.
F. W. ROVET
Suite 3100 IVB Building
1700 Market Street
Philadelphia, Pa. 19103
(215) 972-3053

Attorneys for Appellants

September, 1977

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

Federal

State Statutes

Municipal Statutes and Ordinances

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC., *Appellants,*

v.

THE CITY OF NEW YORK, *et al.*, *Appellees.*

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

Penn Central Transportation Company, certain of its affiliates and UGP Properties, Inc. (hereafter referred to collectively as "Penn Central") appeal from a decision of the Court of Appeals of New York which holds that Penn Central is not entitled to just compensation for the development rights to the Grand Central Terminal that have been taken from it by operation of the New York City Landmarks Preservation Law.

OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet officially reported. It is attached as Appendix A.[1] The opinion of the New York Supreme Court, Appellate Division, First Department, is reported at 50 App. Div. 2d 265 and 377 N.Y.S.2d 20 (1975). That opinion, and the accompanying order and findings of fact by the Appellate Division, are attached as Appendix B. The findings of fact and declarations of law, memorandum decision, orders and judgment of the Trial Term of the New York Supreme Court are not officially reported. They are attached as Appendix C.

JURISDICTION

Penn Central instituted this action as a suit for declaratory and equitable relief and monetary damages in the state courts of New York pursuant to the New York Civil Practice Law and Rules. The final judgment of the New York Court of Appeals, the highest court of the state, was entered on June 23, 1977. The Notice of Appeal to this Court, attached as Appendix D, was filed on September 8, 1977, in the New York Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court: *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971); *Street* v. *New York,* 394 U.S. 576, 581-85 (1969); *Jamison* v. *Texas,* 318 U.S. 413, 414 (1943).

---

[1] All of the Appendices are bound separately and filed together with this Jurisdictional Statement.

STATUTES INVOLVED

Pertinent portions of the New York City Landmarks Preservation Law, New York City Charter and Administrative Code, ch. 8-A, and applicable New York zoning resolutions are set forth in Appendix E. Pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States are set forth in Appendix F.

QUESTIONS PRESENTED

Does the social and cultural desirability of preserving historical landmarks through government regulation derogate from the constitutional requirement that just compensation be paid for private property taken for public use?

Is Penn Central entitled to no compensation for that large but unmeasurable portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to have been created by the efforts of "society as an organized entity"?

Does a finding that Penn Central has failed to establish that there is no possibility, without exercising its development rights, of earning a reasonable return on all of its remaining properties that benefit in any way from the operations of the Grand Central Terminal warrant the conclusion that no compensation need be paid for the taking of those rights?

Does the possibility accorded to Penn Central, under the landmark-preservation regulation, of realizing some value at some time by transferring the Terminal development rights to other buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires

ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation as applied to landmarks?

STATEMENT OF THE CASE

In 1967, over the objection of Penn Central, the Landmarks Preservation Commission of the City of New York (hereafter, the "Landmarks Commission") designated the Grand Central Terminal and its site as a "landmark" and a "landmark site" respectively. Under New York City's Landmarks Preservation Law (hereafter, the "Landmarks Law"),[2] no construction on the site and no alteration of the exterior appearance of the Terminal are permitted without prior approval by the Landmarks Commission. (A. 88-90)[3]

The Terminal, located in mid-town Manhattan, was opened for operations in 1913 and serves as the terminus for a number of the operating railroad divisions of the Penn Central. As originally designed in the early 1900's, the Terminal was intended as a combined railroad station and office tower, although the latter was never built. As the Trial Term of the New York Supreme Court found, the Terminal is physically "deteriorating at a substantial rate." (A. 53)

In order to minimize its losses on the Terminal's operations—a goal which increased considerably in importance when the Penn Central was declared bank-

[2] The express purpose of the Landmarks Law is to prevent the "irreplaceable loss to the people of the city" that might be caused by the loss of landmarks. N.Y.C. Admin. Code § 205-1.0(a). (A. 76)

[3] The Landmarks Law provides for criminal sanctions against any person who violates this or other provisions of the statute. N.Y.C. Admin. Code § 207-16.0. (A. 108-09)

rupt on June 21, 1970—Penn Central entered arms-length negotiations with UGP Properties, Inc. (hereafter, "UGP") resulting in a lease under which UGP was to construct an office building on the Terminal site. The lease provided that UGP would pay Penn Central $1,000,000 per year during construction of the tower; after its completion, Penn Central was guaranteed at least $3,000,000 per year, and additional amounts based on the total space actually rented. (A. 48) Some existing rental properties would be lost because of construction required for the foundations of the tower.

After a design for the office tower had been completed, and in compliance with the Landmarks Law, Penn Central submitted the design to the Landmarks Commission and applied for a "Certificate of No Exterior Effect," the granting of which would have permitted the office building to be constructed. N.Y.C. Admin. Code § 207-5.0. (A. 90-91) The application was denied on September 20, 1968. Penn Central then applied for "Certificates of Appropriateness," N.Y.C. Admin. Code § 207-6.0 (A. 91-93), submitting its original plan and two revisions as alternatives.[4] The last of these applications was denied on August 26, 1969.[5]

[4] All of the proposed designs submitted to the Landmarks Commission were prepared by the architect Marcel Breuer and were in conformity with the applicable zoning regulations (as distinguished from the Landmarks Law); no variances were required to construct the office tower. (A. 54-55)

[5] The Landmarks Law provides that after a denial of an application either for a Certificate of No Exterior Effect or a Certificate of Appropriateness, certain landmark owners may apply for relief because of insufficient return (defined as less than six percent per

How the Federal Question Is Presented

By designating Grand Central Terminal and its site as a landmark and a landmark site, the Landmarks Commission imposed a substantial restriction on Penn Central's right to develop the Terminal property. By its subsequent denials of applications for certificates that would have permitted the construction of the proposed office tower, the Landmarks Commission effectively precluded any further development of the Terminal site.

Following the Landmarks Commission's decisions, Penn Central and UGP instituted this action on October 7, 1969. They sought a declaratory judgment, alleging in their complaint that the actions of the Landmarks Commission constituted a taking of private property for public use without just compensation in violation of due process and equal protection of the laws.[6] (A. 4, 61) The Trial Term of the New York Supreme Court agreed, and declared the application of the Landmarks Law to Grand Central Terminal unconstitutional.

The City of New York appealed. The Supreme Court's Appellate Division reversed the trial court, upholding the constitutionality of the Landmarks Law

year of the property's valuation). This relief was not available to Penn Central, however, because it is not extended to railroad property having partial real-estate tax exemption. N.Y.C. Admin. Code § 207-8.0a(2). (A. 95) As the dissent in the Appellate Division points out, Grand Central is the only such property which has been designated as a landmark. 377 N.Y.S. 2d at 32 (Lupiano, J., dissenting). (A. 30)

[6] Penn Central also sought compensation for the damages caused by the taking. These claims were severed by the Trial Term of the New York Supreme Court and judgment reserved. (A. 60-61)

as applied and finding that there had been no compensable taking. Two of the five justices dissented, essentially adopting the rationale of the Trial Term.

The New York Court of Appeals, the highest court of the state, affirmed the decision of the Appellate Division on the ground that the preservation of landmarks is so socially and culturally desirable that private property taken by governmental regulation to achieve such preservation is not entitled to the same compensation as private property taken for other public uses. (A. 2-3)

The Court reasoned that there was "no constitutional imperative" that a property owner's economic return "embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests." (A. 2) In so doing, the court sought to distinguish the "ingredient of property value" created by "the efforts of the property owner" from the "ingredient" created "by the accumulated indirect social and direct government investment in the physical property, its functions, and its surroundings." (A. 1-2, 9) Because of "the limited purposes of a landmarking statute," the court held that "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return." (A. 2-3) Considering only this "privately created ingredient," the court held that Penn Central had failed to prove that it was impossible to earn a "reasonable return" on all its properties benefited by the Terminal's operations, even if the Terminal itself "can never operate at a profit." (A. 9)[7]

[7] In the New York courts, Penn Central presented substantial evidence that it was not now earning, and could not after Grand

The court also reasoned that Penn Central had not been "wholly deprived of the development rights above the Terminal," because those rights had been made "transferable" under certain conditions to other nearby properties.[8] (A. 11) While noting the "many defects" of the City's "transferable development rights" (hereafter, "TDR's") program under the Landmarks Law, and acknowledging that such rights "may not be equivalent in value" to the development rights taken from Penn Central, the court concluded that the TDR's "are valuable" and provide "significant, perhaps 'fair', compensation for the loss of rights above the Terminal itself." (A. 13-14) Based on the foregoing analysis, the Court of Appeals concluded that the application of the Landmarks Law to the Grand Central Terminal, without just compensation to Penn Central for the development rights taken, was constitutional. This appeal followed.

Central's designation as a landmark earn, a reasonable return on the Terminal. Penn Central does not press that claim in this Court, because this factual question becomes immaterial once the Court of Appeals' error in abandoning the just-compensation rule is recognized.

[8] "Transferable development rights" in theory permit a landmark owner to convey to a limited number of nearby properties the right to develop his own property. The transferee owners, also in theory, are then permitted to build on their properties in a manner that exceeds the otherwise applicable zoning regulations. Under New York City's plan, the TDR's are not created by the Landmarks Law, but by separate zoning resolutions.

The transfer of development rights is permitted in any case to any property owner holding contiguous parcels of land; in the case of landmark owners, the extent to which transfers are allowed is somewhat enhanced. (A. 113-18) *See* Marcus, "Air Rights Transfers in New York City," 36 J.L. Contemp. Prob. 372, 373-75 (1971).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Probable Jurisdiction Should Be Noted Because of the Pervasive Importance of the Issues Presented and Because of the Novelty of the Decision Below.

Numerous state statutes and municipal and county ordinances have recently been enacted to preserve landmarks deemed to be of historical or aesthetic importance,[9] and the topic has been one of the most

---

[9] *See* Cal. Pub. Res. Code §§ 5020-42 (West 1977); Conn. Gen. Stat. §§ 147a-m, § 10-321-321g (1977); Ill. Rev. Stat. Ch. 127 § 132.402 (1976 Supp.); Ohio Rev. Code Ann. § 1743.07 (Page 1976); Pa. Stat. Ann. tit., 71 § 104 (Purdon 1977); Va. Code §§ 10-135-150 (1977).

Los Angeles, Cal., Ordinance 121,971 (April 30, 1962); San Diego, Cal., Municipal Code ch. II, art. 6, § 26.02 (1976); San Francisco, Cal., Municipal Code pt. II, ch. II, art. 10 (1966); Santa Clara, Cal., Code art. VIII, § 2-90 (1973); Denver, Colo., Rev. Mun. Code ch. 130, § 1, art. 131 (1967); D.C. Building Code tit. 5A-1 (1973); D.C. Code tit. 5, § 5-410 (1977); Atlanta, Ga., Zoning Ordinance art. XIX-B, H-A (1975); Chicago, Ill., Municipal Code §§ 21-62 to 64.2 (1968); Indianapolis, Indiana, Code ch. 15, §§ 53-1501 to 1524 (1975); Baltimore, Md., Ordinance 939 (March 2, 1967); Detroit, Mich., Code ch. 28A (1976); Kansas City, Mo., (ordinance proposed Jan. 14, 1977); St. Louis, Mo., Rev. Code ch. 914B (1972); Albuquerque, N.M., Zoning Code §§ 33, 43 (1967); Rochester, N.Y., Landmark & Preservation Code, ch. 67A (1969); Boston, Mass., Mass. Gen. Laws Ann. ch. 772 (West 1975); Cincinnati, Ohio, Ordinance 169-1973 (April 18, 1973); Cleveland, Ohio, Ohio Code, ch. 40, §§ 1.4001-1.4009 (1973); Philadelphia, Pa., Code of Gen. Ordinance, § 14-2008 (1957); Memphis, Tenn., Landmarks Commission Ordinance (unnumbered, undated); Dallas, Tex., Code ch. 19A (1974); Milwaukee, Wis., Code § 16-16 (1976); Madison, Wis., Gen. Ordinances § 33.01 (1974); Seattle, Wash., Ordinance 102229 (May 29, 1973).

Santa Barbara County, Cal., Ordinance 1716 (March 21, 1966); Santa Clara County, Cal., Ordinance NS-300.172 (March 20, 1973); Loudoun County, Va., Zoning Ordinance § 750 (1977).

See generally Jacob H. Morrison *Historic Preservation Law* (1965 & supp.); *Directory of Landmark and Historic District Commissions*, National Trust for Historic Preservation (1976).

widely discussed subjects in legal literature.[10] Commentators have pointed out that "States and municipalities are presently enacting, at a rapidly increasing rate, statutes to preserve individual historic structures," and that "[o]ver the last decade, American cities have adopted a variety of incentive zoning programs in a determined attempt to expand their leverage over private land use decisions."[11]

Many of these landmarks provisions, including New York City's Landmarks Law at issue here, do not provide for payment of just compensation to owners of structures designated as landmarks. They thus seek to avoid, where government seeks to achieve cultural or aesthetic goals, the constitutional imperative that has long governed the taking of private property for all other public needs.

The issues presented are obviously national in scope, and their resolution will have considerable social and financial consequences both for those who, like the Penn Central, own properties designated as "landmarks" and for the jurisdictions which have enacted

[10] *See, e.g.*, Note, "The Unconstitutionality of Transferable Development Rights," 84 Yale L.J. 1101 (1975); Wolf, "The Landmark Problem in New York," 22 N.Y.U. Intramural L. Rev. 99 (1967); Costonis, "'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," 75 Colum. L. Rev. 1021 (1975); Berger, "The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis," 76 Colum. L. Rev. 799 (1976); Marcus, "Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks," 24 Buff. L. Rev. 77 (1973).

[11] Note, "Landmark Preservation Laws: Compensation for Temporary Taking," 35 U. Chi. L. Rev. 362 (1968).

[12] Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harv. L. Rev. 574, 575 (1972).

landmark laws. This Court has never intimated, let alone held, that the constitutional requirement of just compensation has diminished application to private property taken to achieve landmark objectives. Indeed, the Court of Appeals, citing no decisions of this Court, noted the absence of "wholly developed principles" and observed that in this area, "[t]he last word has not only not been spoken; it has hardly been envisaged." (A. 14) It is plain, therefore, that this case properly raises substantial constitutional questions which have not been, but should be, decided by this Court.

Penn Central makes no assertion that the preservation of buildings of historical or aesthetic importance is not an appropriate objective of governmental action in pursuit of the public welfare.[13] What is challenged is the novel holding of the court below that landmark preservation statutes somehow present different issues under the Due Process Clause than other compensation cases previously decided by this Court. Two aspects in particular of the Court of Appeals decision distinguish it from prior case law on this issue.[14] These

[13] Berman v. Parker, 348 U.S. 26 (1954); Roe v. Kansas, 278 U.S. 191 (1929); United States v. Gettysburg Electric Ry., 160 U.S. 668 (1896); Flaccomio v. Mayor & City Council of Baltimore, 71 A.2d 12 (Md. 1950). All these cases involved a governmental action designed to promote historical or aesthetic values, and all were accompanied by just compensation to the property owner in question. In particular, this Court stressed in *Gettysburg Electric Ry.* that because such compensation had to be paid, "there is not much ground to fear any abuse of the [government's] power." 160 U.S. at 680. Abuse has, however, occurred here, precisely because the eminent domain power has been ignored and just compensation refused.

[14] While the court below asserts as a constitutional conclusion that in this case "there is no taking" (A. 5), its entire opinion rests on its acknowledgment that a valuable property right has

two interrelated holdings, if allowed to stand, would carve out substantial exceptions from the protection of the Due Process Clause.

First, the decision below excepts "landmarks laws" from longstanding Due Process Clause analysis. It creates a special constitutional category "for the limited purposes of a landmarking statute." (A. 2-3) The Court of Appeals explicitly stated that, when a landmark statute's provisions are applied to private property, "just compensation" to the property owner is not required. The court said "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return," even though that ingredient could not be isolated or measured and the rate-of-return concept defied rational application. (A. 2-6)[15]

Not surprisingly, no authority whatever is cited to support this "reasonable return on private ingredient of value" standard that permits "landmarks" to be treated differently from other kinds of property for purposes of the Due Process Clause. *See Benenson* v.

---

been taken from Penn Central. That such right has been extinguished and not been transferred to some other owner is constitutionally immaterial. *Cf.* United States v. Causby, 328 U.S. 256 (1946).

Similarly, the Court of Appeals' statement that the Landmarks Law is an exercise of governmental "regulation" rather than a resort to eminent domain (A. 1) is merely conclusory. As just noted, the court below clearly recognized that Penn Central had been deprived of an important interest in its property; the characterization of the Landmarks Law as "regulation" is indicative only of the court's result, not its reasoning, and is not determinative of whether Penn Central is entitled to just compensation for the value of that interest.

[15] The court acknowledged that the so-called public and private contributions were "inseparably joint" (A. 9), and that the concept of "reasonable return" is "elusive," "incapable of easy definition" and involves an "obvious" and "inevitable circularity of reasoning." (A. 6) (See note 5, *supra*, p. 5-6).

United States, 548 F.2d 939, 212 Ct. Cl. (1977). In other cases where property rights are taken, compensation has been required whether or not any remaining property interest can still earn a "reasonable return." *Griggs* v. *Allegheny County*, 369 U.S. 84 (1972); *United States* v. *Causby, supra*, 328 U.S. at 262; *Portsmouth Co.* v. *United States*, 260 U.S. 327 (1922). The reliance of the court below on its conclusion that Penn Central failed to show that the Terminal and surrounding properties were incapable of earning a reasonable return is, therefore, totally contrary to this Court's prior decisions.

Significantly, because of the construction given to the Landmarks Law by the Court of Appeals, holding that "[t]his is not a zoning case" (A. 4), this case may properly be distinguished from decisions of this Court involving zoning laws such as *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). The court below also distinguished this case from "landmark regulation of historic districts." (A. 5) As in the case of zoning, property owners in historic districts benefit "from the furtherance of a general community plan," whereas "[r]estrictions on alteration of individual landmarks are not designed to further a general community plan." *Id.*

Second, the effort by the court below to limit compensation to that portion of value created solely by "private" efforts is equally novel. It expressed the view that

> "there is no constitutional imperative that the return [to a property owner] embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which property rests." (A. 2)

It said further that "society . . . has created much of the value of the terminal property" (A. 7) by the "accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings." (A. 1-2) This analysis of "property" was used by the court below to support its conclusion that there was no requirement that Penn Central receive just compensation when application of the Landmarks Law precluded further development of Grand Central Terminal.

In *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945), this Court defined property as

> "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The court below has substantially altered this accepted understanding of "property" by artificially dividing it into "privately created ingredients" and "socially" created ingredients. (A. 1-3) This confiscation of property values by reference to the undefined (and in fact undefinable) "social complex" in which the property rests is a principle that cannot be contained.[16] The

[16] The court below acknowledged that "It may be true that no property has economic value in the absence of the society around it. . . ." It found it persuasive, however, that this truism is "much more true . . . of a railroad terminal." (A. 7)

The Court of Appeals ignores the historical fact that Penn Central's development of the air rights over its sunken railroad tracks made Park Avenue "one of this nation's most prestigious residential communities," 377 N.Y.S.2d at 25 (A. 20), thus directly contributing to the present high land values near the terminal.

Moreover, appellant UGP is neither a railroad nor a railroad terminal. It has never received any of the "favors" from society

rationale of the court below could be extended to every form of property, leaving the Due Process Clause a meaningless and ineffectual restriction on government." No property, real or personal, is an island to itself. Its value must reflect the relevant environment, including social and governmental forces. What the court below has reasoned with respect to the Grand Central Terminal applies equally to a private residence taken for a city park or a farm taken for an interstate highway.

The novelty and reach of the principles enunciated by the court below thus warrant review by this Court.

II. The Decision Below Conflicts with Prior Decisions of This Court Under the Due Process Clause

By enacting the Landmarks Law, New York City has attempted to prevent the "irreplaceable loss to the people of the city" that might occur if landmarks were destroyed. N.Y.C. Admin. Code § 205-1.0(a). (A. 76) It may be, as the Landmarks Commission has determined, that Grand Central should be preserved in its "pristine" form for the people of New York. The effect of the decision by the court below, however, is to force Penn Central to bear the entire cost of such preservation, from which the rest of society benefits. Significantly, the court below acknowledged that, unlike zoning regulations, (*see* p. 13, *supra*) the

ascribed to the railroad. The opinion below does nothing to explain why UGP can be denied just compensation for the extinguishment of its leasehold interest.

[17] As Mr. Justice Holmes warned in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), "the natural tendency of human nature is to extend the [police power] . . . more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

"burden" of a landmark designation "is borne by a single owner" and thus resembles "discriminatory" zoning restrictions that are properly condemned. (A. 5-6) The effect on Penn Central is, therefore, precisely the same on the property owner as in the paradigm use of eminent domain—one owner's property is taken for the benefit of the rest of society. The Terminal is confined to its 1913 dimensions in order to enhance the enjoyment of all who may view it—both New Yorkers and those who visit—and for the benefit of surrounding office towers.

Prior decisions of this Court, considering government conduct trenching on private-property rights, have made it plain that New York City's actions—"freezing" Grand Central in its present form and precluding its development without providing just compensation to the Penn Central—are constitutionally impermissible. In *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960), this Court explained that

> "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The *Armstrong* decision thus echoed the rationale expressed years ago in *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 325 (1893), that the right to just compensation for a taking "prevents the public from loading upon one individual more than his just share of the burdens of government . . . ." *See also Richards* v. *Washington Terminal Co.,* 233 U.S. 546, 557 (1914).

The Court of Appeals attempts to elide these considerations by discussing, in a somewhat obscure fashion, the "transferable development rights" ("TDR's") created by the New York City zoning resolutions. (*See* p. 8, *supra.*) Whatever role the TDR's may play in the reasoning of the court below,[18] they do not constitute just compensation for the Terminal development rights taken from Penn Central by the Landmarks regulation.

As the court below concedes, the value of the TDR's, if any, is highly speculative and uncertain. The court discussed at length the "many defects" in New York's TDR program, noting that the area in which transfers are permitted is "severely limited," and that "complex procedures are required to obtain a transfer permit." (A. 11) The court also conceded that the TDR's "may not be the equivalent in value to development rights on the original site."[19] (A. 12) In fact, as noted *supra,* p. 8 n.8, because the transfer of development rights is already permitted to a certain extent, landmark TDR's represent at best a marginal enhancement in the landmark owner's position as compared to that of other property owners.[20]

---

[18] The court first asserts that such TDR's "may be considered" in "computing return" on the remaining property held by Penn Central (A. 2), presumably in support of the view that such return, rather than compensation, is all that is required in landmark regulation. Later the court is emboldened to say that, with all their deficiencies, these TDR's may discharge the constitutional requirement of compensation for the taking of the Terminal development rights. (A. 13-14)

[19] The Court of Appeals thus does not appear to dispute the proposition that the development rights are valuable interests.

[20] Moreover, the TDR's representing air rights over the Terminal cannot be transferred as a unit (because of zoning restrictions)

In short, Penn Central must bear the risk of realizing any value through the transfer of the development rights, without regard to whether or not the price it ultimately receives for them is economically equivalent to the rights lost to it. The appropriate constitutional standard not only requires such equivalence but also certainty of payment.[21] Here, the value lost is clearly established by the terms of the parties' lease agreement (*see* p. 5, *supra*). Only compensation in that amount would put Penn Central "in as good position pecuniarily as if [its] property had not been taken." *United States* v. *General Motors, Corp., supra,* 323 U.S. at 379. What Penn Central has lost in value is not even coincidentally related to the highly speculative (and procedurally encumbered) value of the TDR's.

The TDR's thus fall far short of being "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 326.[22] The court below, in an earlier case, described TDR's as having an "uncertain and contingent market value" that "did not adequately preserve" the value of

---

to a single parcel of land. They must be "broken up" and sold in smaller amounts, thus increasing both the economic risks to Penn Central and the transaction costs involved, and thereby lowering the value of the TDR's still further.

[21] Boom Co. v. Patterson, 98 U.S. (8 Otto) 403, 408 (1878). *See also* United States v. Miller, 317 U.S. 369, 374-75 (1943); McCandless v. United States, 298 U.S. 342, 345-46 (1936); Monongahela Navigation Co. v. United States, *supra,* 148 U.S. at 328-29.

[22] *See also* Regional Rail Reorganization Act Cases, 419 U.S. 102, 150-51 (1974); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973); United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. Miller, *supra,* 317 U.S. at 373; Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 242 (1897).

the rights taken by landmarks regulation. *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y.2d 587, 591, 385 N.Y.S.2d 5, 7, *appeal dism'd,* 429 U.S. 990 (1976). *See* Note, "The Unconstitutionality of Transferable Development Rights," 84 *Yale L. J.* 1101, 1110-11 (1975). Placing the risk of obtaining "just" compensation on the property owner does not satisfy the guarantee of the Due Process Clause. When the government takes property, it is the government that must see to the compensation. The City of New York, as the court below recognizes, has simply not fulfilled its constitutional obligations.

* * *

The explanation of the constitutional tour de force attempted by the Court of Appeals may lie largely in the well-publicized financial condition of New York City. After concluding that the Landmarks regulation was constitutional as applied to the Grand Central Terminal, the court observed:

> "In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." (A. 14)

Neither affluence nor penury, however, determines the reach of basic constitutional guarantees. As this Court has forthrightly stated, "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." *United States* v. *Cors,* 337 U.S. 325, 332 (1949).

To whatever extent, therefore, that New York City's financial condition may have influenced the drafters of the Landmarks Law or the court below, the objective of such legislation may not be accomplished through unconstitutional means. The right to receive just compensation for private property taken for public use has long been exalted as an essential protection against governmental abuse and discrimination. *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871); *United States* v. *Gettysburg Electric Ry., supra,* 160 U.S. at 680; *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 415. It was in the *Mahon* case that Mr. Justice Holmes observed that the Constitution protects against the disappearance of private property through the unlimited extension of the police power. The City's financial embarrassment, regrettable as it may be, does not warrant the subversion of constitutional guarantees.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

DANIEL M. GRIBBON
JOHN R. BOLTON

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6118

CARL HELMETAG, JR.
F. W. ROVET
Suite 3100 IVB Building
1700 Market Street
Philadelphia, Pa. 19103
(215) 972-3053

Attorneys for Appellants

September, 1977